STATE OF MICHIGAN

COURT OF APPEALS

ANNIE MARBLY,

Plaintiff-Appellant,

v

MCKINLEY ASSOCIATES INC, d/b/a LAKE IN THE WOODS APARTMENTS,

Defendant-Appellee.

UNPUBLISHED
March 27, 2007

No. 268580
Washtenaw Circuit Court
LC No. 04-001359-NO

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

In this premises liability case, plaintiff appeals as of right from an order granting summary disposition in favor of defendant under the open and obvious doctrine. For the reasons set forth in this opinion, we reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a resident of defendant's apartment complex, injured herself at approximately 6:30 a.m. on February 10, 2003, as she attempted to walk to her car. The car was located under a carport in defendant's parking lot. Although it was dark outside, there was lighting in the parking lot. It had snowed overnight, and plaintiff maintained that less than one inch of snow covered the ground. Plaintiff followed a walkway out to the sidewalk, and then followed the sidewalk to the parking lot. She maintained that the snow was not slippery, but stated that she walked slowly and watched where she stepped.

Plaintiff's car was parked in an open carport, apparently in the row of cars closest to her apartment. Plaintiff walked across the parking lot, which was also covered in snow, until she reached the area under the overhang of the carport where she then slipped and fell, breaking her ankle. After she fell, she noticed that she had fallen on ice, in a patch big enough that the ambulance drivers were slipping when they arrived to help her.

Plaintiff filed suit alleging negligence. She maintained that the condition of the carport roof caused water to fall from the roof, form a puddle on the ground, and freeze. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff's suit was barred by the open and obvious doctrine. The trial court granted defendant's motion, finding that the condition posed by the ice and snow was open and obvious, and that it was not otherwise

unreasonably dangerous despite its open and obvious condition. The trial court also held that plaintiff had not presented evidence "suggesting that the carport violated any statutory duty."

We review de novo a trial court's ruling on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In reviewing a motion pursuant to MCR 2.116(C)(10), a court considers affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

A landowner has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, a premises possessor is not generally required to protect an invitee from an open and obvious danger. *Id*. Whether a condition is "open and obvious depends on whether it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *O'Donnell v Garasic*, 259 Mich App 569, 575; 676 NW2d 213 (2003). "Because the test is objective, this Court 'looks not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger.'" *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002), quoting *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). Only when a condition on the land contains "special aspects" that render it unreasonably dangerous in spite of its open and obvious nature, such as when it presents a "uniquely high likelihood of harm or severity of harm if the risk is not avoided," does a landowner continue to owe a duty to undertake reasonable precautions to protect invitees from that risk. *Lugo*, *supra* at 517-519; *Joyce*, *supra* at 240.

Plaintiff briefly argues that genuine issues of fact existed regarding whether the danger was open and obvious. We agree with the trial court that the danger posed by the ice and snow was open and obvious upon casual inspection by a person in plaintiff's position. *Kenny v Kaatz Funeral Home Inc*, 264 Mich App 99, 117-118; 689 NW2d 737 (2004) (Griffin, J., dissenting), rev'd for the reasons stated in the dissenting opinion, 472 Mich 929 (2005). However, the outcome of this case does not turn on the open and obvious doctrine, but on whether defendant satisfied its statutory obligations under MCL 554.139, which provides in pertinent part:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the *premises and all common areas* are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants [sic] willful or irresponsible conduct or lack of conduct.
>
> * * *

(3) The provisions of this section *shall be liberally construed* . . . . [Emphasis added.]

In *O'Donnell*, *supra*, this Court held that a defendant cannot use the open and obvious danger to avoid liability when the defendant has a statutory duty under MCL 554.139(1) to maintain the premises in reasonable repair:

> The open and obvious danger doctrine is not available to deny liability to an injured invitee or licensee on leased or licensed residential premises when such premises present a material breach of the specific statutory duty imposed on owners of residential properties to maintain their premises in reasonable repair and in accordance with the health and safety laws, as provided in MCL 554.139(1)(a) and (b). [*O'Donnell*, *supra* at 581.]

Relying on *O'Donnell*, in *Benton v Dart Properties Inc*, 270 Mich App 437, 441, 444-445; 715 NW2d 335 (2006), this Court observed that "if defendant breached its duties under MCL 554.139, defendant would be liable to plaintiff even if the ice on the sidewalk was open and obvious" and held that a landlord cannot use the open and obvious doctrine to circumvent its statutory duty under MCL 554.139(1)(a) to maintain sidewalks in a condition fit for their intended use. In other words, under *O'Donnell* and *Benton*, the open and obvious danger doctrine is not available to a defendant landlord if the defendant breached its duties under MCL 554.139(1)(a) or (b).[1] Furthermore, according to *Benton*, a landlord's duty to keep its premises or common areas fit for their intended use extends to snow and ice removal:

> Therefore, a landlord has a duty to take reasonable measures to ensure that the sidewalks are fit for their intended use. Because the intended use of a sidewalk is walking on it, a sidewalk covered with ice is not fit for this purpose. Thus, under our holding in *O'Donnell*, defendant owed plaintiff a duty of reasonable care regardless of the openness or obviousness of the icy sidewalk conditions. [*Benton*, *supra* at 444.]

In *Teufel v Watkins*, 267 Mich App 425; 705 NW2d 164 (2005), however, this Court stated, not in the body of the opinion, but in a footnote, that a landlord's duty under MCL 554.139(1) did not extend to snow and ice removal and therefore concluded that the open and obvious danger doctrine barred the plaintiff's claim:

> Plaintiff also argues that the trial court erred when it failed to address his argument that [the defendant] had a statutory duty under MCL 554.139 to keep its premises and common areas in reasonable repair and fit for their intended uses, which negates the defense of open and obvious danger. Any error in the trial

[1] At the time the trial court granted summary disposition based on the open and obvious doctrine, our *O'Donnell* decision had been long published, but *Benton* had not yet been decided.

> court's failure to address this argument is harmless. The plain meaning of "reasonable repair" as used in MCL 554.139(1)(b) requires repair of a defect in the premises. Accumulation of snow and ice is not a defect in the premises. Thus, a lessor's duty under MCL 554.139(1)(a) and (b) to keep its premises in reasonable repair and fit for its intended use does not extend to snow and ice removal. [*Id*. at 429 n 1.]

Recently, this Court, in *Allison v AEW Capital Management*, LLP, __ Mich App __; __ NW2d __ (2007) (Docket No. 269021), addressed the apparent inconsistencies between the footnote in *Teufel* and this Court's holding in *Benton*. According to the Court in *Allison*, this Court's statement in the footnote of *Teufel* was legally flawed and did not constitute a rule of law under MCR 7.215(J)(1). Furthermore, we stated in *Allison*: "[h]ad our Court in *Teufel* intended to create a rule of law regarding the availability of the open and obvious danger doctrine when a landlord has a statutory duty under MCL 554.139(1)(a) and (b), it would have done so in the body of the opinion rather than in a footnote." *Allison*, slip op at __. Therefore, the *Allison* court determined that it was not bound by MCR 7.215(J)(1) to follow the statement in the footnote of *Teufel*.

Instead, the *Allison* court extended the rule of *Benton* to parking lots and held that a landlord could not use the open and obvious to circumvent its statutory duty under MCL 554.139(1)(a) to keep the premises fit for the use intended by the parties. The facts in *Allison* are nearly identical to the instant case: the plaintiff, a resident of an apartment complex, slipped and fell on an accumulation of snow and ice in the parking lot of his apartment complex as he attempted to walk to his car in the parking lot. This Court concluded that the parking lot constitutes a common area under MCL 554.139(1)(a) and that the defendant had a duty to keep the parking lot free from ice:

> The parking lot, like the sidewalk in *Benton*, is located within the parameters of the apartment complex and must be maintained by the landlord or someone in the landlord's employ. In addition, tenants also must necessarily walk on the parking lot to access their vehicles from their apartments and to access their apartments from their vehicles. The intended use of a parking lot is to park cars and other motor vehicles; however, in order to access their vehicles and apartments, tenants must also necessarily walk on the parking lot. A second intended use of a parking lot, therefore, is walking on it. A parking lot covered with ice is not fit for this purpose. See *Benton*, *supra*. In extending the holding of *Benton* to a parking lot, we are mindful that the provisions of MCL 554.139 "shall be liberally construed[.]" MCL 554.139(3). We therefore conclude that a parking lot, like a sidewalk, constitutes a common area under MCL 554.139(1)(a) and that defendant had a duty to keep the parking lot free from ice. [*Allison*, slip op at __.]

For the same reasons we articulated in *Allison*, we find that the area underneath the carport also constitutes a common area under MCL 554.139(1)(a). Regardless whether the area is considered a part of the parking lot or its own separate entity, the area is located within the parameters of the apartment complex and must be maintained by the landlord or someone in the landlord's employ. In addition, tenants whose cars are parked in carports must necessarily walk in the area underneath the carport to access their vehicles from their apartments and to access

their apartments from their vehicles. While the intended use of a carport is to park cars, it is impossible to access a car parked in a carport without walking on the area underneath the carport. Therefore, a second intended use of the area underneath the carport is to walk on it, and such an area is not fit for its intended use if it is covered with ice. *Benton*, *supra*; *Allison*, *supra*. We conclude that the area underneath a carport in an apartment complex, like a sidewalk and parking lot, constitutes a common area under MCL 554.139(1)(a) and that defendant had a duty to keep this area free from ice.

Because defendant had a duty under MCL 554.139(1)(a) to keep the area underneath the carport free from ice, the trial court erred in granting summary disposition based on the open and obvious doctrine. The open and obvious doctrine cannot defeat a defendant landlord's liability if the defendant breached its statutory obligation under MCL 554.139(1). *O'Donnell*, *supra*; *Benton*, *supra*; *Allison*, *supra*. We therefore reverse the trial court's decision granting summary disposition in favor of defendant based on the open and obvious doctrine.

Reversed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper